



**U.S. Citizenship
and Immigration
Services**

Non-Precedent Decision of the
Administrative Appeals Office

In Re: 1620898

DATE: SEP. 30, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner, a healthcare services company, seeks to employ the Beneficiary as a director of nursing. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This EB-2 employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the offered job requires an advanced degree. The Director also concluded that the offered job does not qualify under Schedule A as a professional nurse.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon de novo review, we will dismiss the appeal.

I. LAW

A. Employment-Based Petitions for Schedule A Occupations

A Schedule A occupation is an occupation codified at 20 C.F.R. § 656.5(a) for which the U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of foreign nationals in such occupations. The current list of Schedule A occupations includes professional nurses and physical therapists. *Id.*

Petitions for Schedule A occupations do not require a petitioner to test the labor market and obtain a certified labor certification from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with a duplicate uncertified labor certification. See 8 C.F.R. § 204.5(a)(2); see also 20 C.F.R. § 656.15.¹ If USCIS

¹ The priority date of the petition is May 5, 2017, the date the completed, signed petition was properly filed with USCIS. See 8 C.F.R. § 204.5(d).

approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. See section 245 of the Act, 8 U.S.C. § 1255.

For Schedule A professional nurse petitions, a petitioner must establish that the beneficiary has a certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); has a permanent, full and unrestricted license to practice professional nursing in the state of intended employment; or has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). 20 C.F.R. § 656.5(a)(2).

B. Eligibility for the Advanced Degree Classification

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. See also 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the term “advanced degree” as follows:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master’s degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

A “profession” is defined as “one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.” 8 C.F.R. § 204.5(k)(2). The occupations listed at section 101(a)(32) of the Act are “architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.”

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

- (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
- (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

The job offer portion of the labor certification or Schedule A application must require a professional holding an advanced degree. See 8 C.F.R. § 204.5(k)(4)(i).

II. JOB REQUIREMENTS AND DUTIES

The labor certification states that the offered position of director of nursing requires a bachelor's degree in nursing or related field, and 60 months of experience as a nurse or related. No alternate combination of education and experience is acceptable, and a foreign educational equivalent is acceptable. Part H.14. of the labor certification requires a "Bachelor's Degree in Nursing with Five (5) Years experience in Nursing or related field. NCLEX-RN Pass Score, or CGFNS Certificate, or Unrestricted Illinois RN License."²

The job duties the offered position are described on the labor certification as follows:

Plans, directs, and supervises the activities of the nursing staff. Ensures the nursing department is in compliance with federal, state, and local regulations. Develop, implement and update department policy and procedures when necessary or as directed. Responsible for providing consistent and sufficient staffing for Guest needs as well as regulatory requirements. Participate in Federal, State and Local agency annual surveys. Review with appropriate department heads any deficiencies noted by government agencies during inspections. Responsible for operating in the Nursing Department within budgetary guidelines and limitations. Completes annual performance reviews of all subordinate staff. Provides guidance and education to staff in regards to their performance. Provides counseling and disciplinary action to subordinate staff members as needed. Responsible for training and educating staff members. Assure that established infection control and standard precaution practices are maintained at all times. Follow established safety precautions when [sic] performing tasks and using equipment and supplies. Reports all hazardous conditions, damaged equipment and supply issues to the appropriate persons. Maintains the comfort, privacy and dignity of Guests and interacts with them in a manner that displays warmth, respect and promotes a caring environment. Must answer and respond to call lights promptly and courteously when working in Guest care areas. Assist with new admissions, readmissions and assist with the transfer of Guests to different rooms within the facility. Communicates and interacts effectively and tactfully with Guests, visitors, families, peers and supervisors. Attend and participate in departmental meetings and in-services.

III. ADVANCED DEGREE PROFESSIONAL

The Director concluded that the record did not establish that the offered job of director of nursing requires an advanced degree professional. Here, the Petitioner has established that the position of director of nursing is a professional occupation. As noted by the Petitioner on appeal, according to Section F.2 of the labor certification, the offered position was assigned the O*NET occupational code of 11-9111 for Medical and Health Services Managers. O*NET is the occupational classification system used by the DOL. O*NET states that the assigned occupational classification falls within Job Zone Five. See O*Net Online, <https://www.onetonline.org/link/summary/11-9111.00> (last visited Sept. 1, 2020). A Job Zone is a group of occupations that are similar in how much education, related

² The Beneficiary has a bachelor's degree in nursing and holds a registered professional nurse license in Illinois. However, as detailed below, she does not have the required 60 months of experience for the offered job.

experience, and/or training people need to do the work. See O*Net Online, <http://www.onetonline.org/help/online/zones> (last visited Sept. 1, 2020). According to O*Net, “[m]ost of these occupations require graduate school. For example, they may require a master's degree, and some require a Ph.D., M.D., or J.D. (law degree).” O*Net Online, <https://www.onetonline.org/link/summary/11-9111.00> (last visited Sept. 1, 2020). Thus, according to the DOL’s occupational data, the offered position is a professional occupation as defined at 8 C.F.R. § 204.5(k)(2) based on the occupation’s minimum educational requirements.

Further, the position requires an advanced degree because its minimum requirement is a United States baccalaureate degree or a foreign equivalent degree followed by five years of nursing or related experience. See 8 C.F.R. § 204.5(k)(2). The Director indicated that the occupation of registered nurse does not normally require an advanced degree. We agree. However, the offered job in this case is for a position with a different occupational classification and duties than a registered nurse, and the job duties are sufficiently complex to warrant an advanced degree. Therefore, we find that the offered job of director of nursing requires an advanced degree professional, and we will withdraw that portion of the Director’s decision. However, for the reasons discussed below, the petition cannot be approved.

IV. PROFESSIONAL NURSE

The Director determined that the job does not qualify under Schedule A as a professional nurse. If the offered position is not a Schedule A occupation, the petition cannot be approved without a DOL-certified labor certification.

The term “professional nurse” is defined as follows:

Professional nurse means a person who applies the art and science of nursing which reflects comprehension of principles derived from the physical, biological and behavioral sciences. Professional nursing generally includes making clinical judgments involving the observation, care and counsel of persons requiring nursing care; administering of medicines and treatments prescribed by the physician or dentist; and participation in the activities for the promotion of health and prevention of illness in others. A program of study for professional nurses generally includes theory and practice in clinical areas such as obstetrics, surgery, pediatrics, psychiatry, and medicine.

20 C.F.R. § 656.5(a)(3)(ii).

Thus, direct patient care is central to the job duties of a professional nurse.³ On appeal, the Petitioner asserts that the definition of professional nurse at 20 C.F.R. § 656.5(a) is not exclusive to registered

³ We note that the DOL’s Occupational Outlook Handbook (OOH) states that registered nurses typically do the following: assess patients’ conditions; record patients’ medical histories and symptoms; observe patients and record the observations; administer patients’ medicines and treatments; set up plans for patients’ care or contribute information to existing plans; consult and collaborate with doctors and other healthcare professionals; operate and monitor medical equipment; help perform diagnostic tests and analyze the results; teach patients and their families how to manage illnesses or injuries; and explain what to do at home after treatment. Bureau of Labor Statistics, DOL, Occupational Outlook Handbook,

nurses and does not restrict Schedule A status to positions that correspond with the O*NET occupational code of 29-1141 for registered nurses. Instead, it asserts that “the relevant question is whether the proffered position meets the regulatory definition” of professional nurse. We agree that the definition of professional nurse at 20 C.F.R. § 656.5(a) is not exclusive to the O*NET occupational code of 29-1141.00 for registered nurses, and that we must look to the job duties of the offered position to determine whether it meets the definition of a professional nurse. The job duties must include direct patient care and otherwise meet the regulatory definition of professional nurse.

On appeal, the Petitioner asserts that the duties of the offered position require the application of clinical nursing knowledge and that they carry “all of the legal hallmarks” of a professional nurse. It categorizes the job duties according to corresponding parts of the definition of professional nurse at 20 C.F.R. § 656.5(a)(3)(ii), as follows:

1. Applies the art and science of nursing which reflects comprehension of principles derived from the physical, biological, and behavioral sciences.

The Petitioner asserts that the director of nursing will provide guidance and education to staff regarding their performance and will be responsible for training and educating staff members. However, the description does not specifically detail the guidance, training, and education to be provided. Because many of the duties relate to budget, personnel, and other administrative functions, some of the training and education that the director of nursing will provide might be related to topics unrelated to the art and science of nursing.

A petitioner bears the burden of establishing eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; Matter of Skirball Cultural Ctr., 25 I&N Dec. 799, 806 (AAO 2012). A petitioner must establish that it meets each eligibility requirement by a preponderance of the evidence. Matter of Chawathe, 25 I&N Dec. 369, 375-76 (AAO 2010). A petitioner’s unsupported statements are of limited weight and normally will be insufficient to carry its burden of proof. The Petitioner must support its assertions with relevant, probative, and credible evidence. See *id.* at 376. The record contains no evidence supporting the Petitioner’s assertion that these duties correspond to the definition of professional nurse.

<https://www.bls.gov/ooh/healthcare/registered-nurses.htm#tab-2> (last visited Sept. 1, 2020). Patient care is central to the duties listed. In contrast, the OOH indicates that medical and health services managers plan, direct, and coordinate medical and health services. Contrary to the Petitioner’s assertions on appeal, patient care is not central to the duties of medical and health services managers. Bureau of Labor Statistics, DOL, Occupational Outlook Handbook, <https://www.bls.gov/ooh/management/medical-and-health-services-managers.htm#tab-2> (last visited Sept. 1, 2020). Instead, the duties of medical and health services managers include improving efficiency and quality; developing goals and objectives; ensuring compliance with laws and regulations; recruiting, training, and supervising staff members; managing finances; creating work schedules; preparing and monitoring budgets and spending; representing the facility at investor meetings or on governing boards; keeping and organizing records; and communicating with staff members and department heads. *Id.*

2. Making clinical judgments involving the observation, care, and counsel of persons requiring nursing care.

The Petitioner asserts that the director of nursing will report all hazardous conditions, damaged equipment, and supply issues to the appropriate persons; ensure the nursing department is in compliance with federal, state, and local regulations; and develop, implement, and update department policy and procedures when necessary or as directed. However, these duty descriptions do not indicate that she will be making clinical judgments related to the care of patients. Instead, the duties appear to be non-clinical actions unrelated to patient care. The record contains no evidence supporting the Petitioner's assertion that these duties correspond to the definition of professional nurse.

3. Administering of medicines and treatments prescribed by the physician or dentist.

The Petitioner asserts that the director of nursing will follow established safety precautions when performing tasks and using equipment and supplies. However, this description does not define the tasks to be performed or indicate that use of equipment and supplies involves administering medicines and treatments. The director of nursing will also plan, direct, and supervise the activities of the nursing staff and will be responsible for "providing consistent and sufficient staffing for Guest needs as well as regulatory requirements." These duty descriptions do not indicate that the director of nursing will be administering medicines and treatments. Staffing is an administrative function, and not a clinical one involving patient care. The record contains no evidence supporting the Petitioner's assertion that these duties correspond to the definition of professional nurse.

4. Participation in the activities for the promotion of health and prevention of illness in others.

The Petitioner asserts that the director of nursing will maintain "the comfort, privacy and dignity of Guests" and interact with them "in a manner that displays warmth, respect and promotes a caring environment." However, this duty does not describe the "Guests" or the director of nursing's interactions with them. There is no indication that the interactions will involve the promotion of health and the prevention of illness. Similarly, the director of nursing "[m]ust answer and respond to call lights promptly and courteously when working in Guest care areas." However, the duty does not describe the "Guests" or the responses that might be provided to them, or indicate how those responses will involve the promotion of health and prevention of illness in others. Further, the director of nursing will "[a]ssist with new admissions, re-admissions and assist with the transfer of Guests to different rooms within the facility." The description does not describe the "Guests" or indicate that the assistance to be provided involves the promotion of health and prevention of illness in others. Instead, the duty appears to be administrative in nature. Also, the director of nursing will "[a]ssure that established infection control and standard precaution practices are maintained at all times." Because the duty description does not identify the infection control and standard precaution practices, or indicate how the director of nursing will assure them, it is not clear how the duty relates to the promotion of health and prevention of illness in others. In addition, the "director of nursing will communicate and interact "effectively and tactfully with Guests, visitors, families, peers and supervisors." The description does not identify the "Guests" or indicate that the interactions involve the promotion of health and prevention of illness in others.

Additionally, the following duties appear to be administrative in nature, and it is not clear how they relate to the promotion of health and prevention of illness in others: attend and participate in departmental meetings and in-services; complete annual performance reviews of all subordinate staff; responsible for operating within budgetary guidelines and limitations; review with appropriate department heads any deficiencies noted by government agencies during inspections; participate in federal, state and local agency annual surveys; and provide counseling and disciplinary action to subordinate staff members as needed. The content of the departmental meetings, in-services, government inspections, and annual surveys is not identified. The record contains no evidence supporting the Petitioner's assertion that these duties correspond the definition of professional nurse.

In sum, the Petitioner has not established by a preponderance of the evidence that the offered position of director of nursing involves direct patient care and otherwise meets the regulatory definition of professional nurse. The record does not contain relevant, probative, and credible evidence regarding the duties of the offered job. Thus, the offered position is not a Schedule A occupation, and the petition cannot be approved without a DOL-certified labor certification.

V. THE BENEFICIARY'S EXPERIENCE

Although not addressed by the Director, the Petitioner did not establish that the Beneficiary possessed the experience required by the labor certification as of the priority date. A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12); Matter of Wing's Tea House, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). In this case, the labor certification requires 60 months of experience as a "nurse or related."

The labor certification states that the Beneficiary qualifies for the offered position based on experience with [REDACTED] in [REDACTED] Illinois, in the following positions:

- Σ Assistant director of nursing from January 9, 2017, onward;
- Σ Charge nurse from January 11, 2016, to September 19, 2016;
- Σ Charge nurse from November 29, 2014, to September 22, 2015;
- Σ Director of nursing from June 10, 2014, to November 28, 2014;
- Σ Charge nurse from September 30, 2013, to June 9, 2014; and
- Σ Charge nurse from October 11, 2012, to September 17, 2013.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. See 8 C.F.R. § 204.5(g)(1).

The record contains an experience letter dated March 3, 2017, from [REDACTED] Executive Director of [REDACTED] confirming that it employed the Beneficiary as detailed above. However, the Beneficiary's combined experience with [REDACTED] through the date of [REDACTED] [REDACTED] letter amounts to approximately 45 months of experience, which is less than the 60 months of experience required by the labor certification. Thus, the Petitioner has not established that the Beneficiary possessed the experience required by the labor certification as of the priority date.

VI. THE BENEFICIARY'S ELIGIBILITY FOR THE ADVANCED DEGREE CLASSIFICATION

Although not addressed by the Director in his decision, the record does not establish that the Beneficiary is eligible for the classification sought. As set forth above, an advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree. Here, the record does not establish that the Beneficiary possessed at least a U.S. academic or professional degree or a foreign equivalent degree above a baccalaureate, or a U.S. baccalaureate or a foreign equivalent degree followed by at least five years of progressive experience in the specialty. See 8 C.F.R. § 204.5(k)(2). Instead, the record confirms that the Beneficiary has the foreign equivalent of a U.S. bachelor of science degree in nursing and approximately 45 months of experience as a nurse or in a related field. Therefore, the Beneficiary does not qualify for classification as an advanced degree professional under section 203(b)(2) of the Act.

VII. IDENTITY OF THE PETITIONER

Although not addressed by the Director, the identity of the Petitioner is not clear. The petition was filed by [REDACTED]. Online records from the Illinois Secretary of State indicate that [REDACTED] and [REDACTED] are separate entities. Office of the Ill. Sec'y of State, <https://www.ilsos.gov/corporateLlc/CorporateLlcController> (last visited Sept. 1, 2020). The assumed name for [REDACTED] is listed as [REDACTED]. Id. Therefore, the petition appears to list the incorrect assumed name for the Petitioner, and it is not clear which entity is the actual Petitioner. In any future proceedings, the Petitioner must resolve the discrepancy with independent, objective evidence of its true identity. See Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988).

VIII. ABILITY TO PAY

Although not addressed by the Director, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date. A petitioner must demonstrate its continuing ability to pay the proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2).⁴ If a petitioner employs 100 or more workers, USCIS may accept a statement from a financial officer of the petitioner which establishes its ability to pay the proffered wage. Id. In this case, the Petitioner submitted a letter from the director of finance of [REDACTED] indicating that [REDACTED] employs 180 workers and "has the ability to pay or exceed the prevailing wage" for the Beneficiary.⁵ The letter gives no additional information about the Petitioner or its continuing ability to pay the proffered wage, such as its net income or net current assets. Additionally, the record does not contain copies of the Petitioner's annual reports, federal tax returns, or audited financial statements. See 8 C.F.R. § 204.5(g)(2). Further, given the inconsistency regarding the Petitioner's identity detailed above, the

⁴ The proffered wage in this case is \$110,906 per year.

⁵ The prevailing wage in this case is \$106,683, which is less than the proffered wage. Thus, the letter does not indicate that the Petitioner has the ability to pay the proffered wage.

letter does not establish the Petitioner's ability to pay the proffered wage because it is not clear if the letter references the correct petitioning entity. Thus, the Petitioner has not established that it has the continuing ability to pay the proffered wage from the priority date.

IX. NOTICE OF FILING

Although not addressed by the Director, the Petitioner did not properly notify its employees of the Schedule A application. A notice of the filing of a labor certification (Notice) must be provided between 30 and 180 days before filing the labor certification application.⁶ See 20 C.F.R. § 656.10(d)(3)(iv). The record contains a Notice which was posted from July 5, 2016, to July 18, 2016. The labor certification application was filed with USCIS on May 5, 2017. The Petitioner has not established that Notice meets the requirements of 20 C.F.R. § 656.10(d)(3)(iv), as it was not provided between 30 and 180 days before filing the labor certification application.

X. CONCLUSION

The Petitioner has established that the offered job requires an advanced degree professional. We will withdraw that portion of the Director's decision. However, the offered job does not qualify under Schedule A as a professional nurse; the Petitioner has not established that the Beneficiary possessed the experience required by the labor certification as of the priority date; the Beneficiary does not qualify for classification as an advanced degree professional; the Petitioner's identity is not clear; the Petitioner has not established its continuing ability to pay the proffered wage from the priority date; and the Notice was filed outside of the regulatory-prescribed timeframe. Thus, the appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision.

ORDER: The appeal is dismissed.

⁶ Petitions for Schedule A occupations must contain evidence establishing that the petitioner provided its U.S. workers with Notice prescribed by 20 C.F.R. § 656.10(d). Calculation of timeframes are discussed at U.S. DOL, OFLC Frequently Asked Questions and Answers, Time Frames, Question #5, <https://www.foreignlaborcert.dol.gov/faqsanswers.cfm#q186> (last visited Sept. 1, 2020). Here the Notice was not posted during the 30 to 180 day time window prior to filing the application.